



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinions Below.

The opinion of the Massachusetts Supreme Judicial Court is reported in 1944 Massachusetts Advance Sheets, 433. The opinion is appended to the Record.

II. Jurisdiction.

1. STATUTORY PROVISION SUSTAINING JURISDICTION.

The jurisdiction of this court is invoked under Judicial Code, sec. 237(b), 28 U.S.C. 344(b), 43 Stat. 937.

2. FINALITY OF JUDGMENT.

The judgment forming the basis of this petition is final both in form and in substance and disposes of all elements of the controversy in the court below.

3. TIMELINESS.

The decree of the Massachusetts Supreme Judicial Court was entered on April 26, 1944. The petition for writ of certiorari is filed before the expiration of three months from that date.

III. Statement of the Case.

A summary statement of the case has been given in the petition for a writ of certiorari and is not repeated at this point.

IV. Specification of Errors.

The petitioners assign as error the holding of the Supreme Judicial Court of Massachusetts overruling the petitioners' exceptions to the following:

1. The failure of the trial judge to grant a motion to dismiss on the ground that the petitioners' actions were done in pursuance of the rights of free speech and of free press, guaranteed them by the due process clause of the Fourteenth Amendment of the United States Constitution (Record, p. 36).

2. The failure of the trial judge to grant a directed verdict (Record, p. 35), Massachusetts Advance Sheets (1944) 433, 443.

3. The failure of the trial judge to instruct the jury properly on the petitioners' constitutional rights as requested specifically in the petitioners' requests for rulings numbered 7, 8, and 9 (Record, pp. 37 and 38). Massachusetts Advance Sheets (1944) 433, 443.

4. The failure of the trial judge to instruct the jury properly regarding the petitioners' constitutional rights to peacefully picket (Record, pp. 27 and 28). Massachusetts Advance Sheets (1944) 433.

These holdings effectively denied to the petitioners their right to picket peacefully in accordance with the constitutional guaranty of free speech and the due process clause of the Fourteenth Amendment.

V. Argument.

A. CONSTRUCTION OF THE INJUNCTION BY THE MASSACHUSETTS COURTS BY PREVENTING PEACEFUL PICKETING DEPRIVED THE PETITIONERS OF THEIR RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The trial court adopted a narrow and erroneous construction of the right to picket peacefully and the Supreme

Judicial Court adopted this construction. The injunction does not come before this court as an isolated, self-contained writing, but as an order with the gloss of the Massachusetts courts on it.

Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 315 U.S. 437, 441.

Peaceful picketing has been established as a constitutional right in a series of cases by this court. This right was first noted in *Senn v. Tile Layers Protective Union*, 301 U.S. 468, and received further clarification in a series of cases including—

Thornhill v. Alabama, 310 U.S. 88.

Carlson v. California, 310 U.S. 106.

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287.

American Federation of Labor v. Swing, 312 U.S. 321.

Journeyman Tailors Union v. Miller's, Inc., 312 U.S. 658.

Bakery Drivers Local v. Wohl, 315 U.S. 769.

Cafeteria Employees Union v. Angelos, 320 U.S. 293.

These cases establish the right of a union in a labor controversy to picket peacefully at the employers' place of business.

The injunction in this case must be construed with these decisions in mind. Therefore paragraph 6 of the preliminary injunction which states:

“There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully

persuade or exercise their rights of free speech and of free press"—

must be taken to modify all of the other paragraphs of the injunction which would otherwise abridge or restrict this fundamental constitutional right.

Under the injunction including this paragraph 6, with the construction that must be placed upon it in accordance with the decisions of this court, the petitioners had no cause to seek a modification or a discharge of the injunction. The Union had no desire at any time to support the strike by any illegal means. Therefore it had no quarrel with the provisions of the injunction designed to prevent the physical blocking of the entrances or to prevent illegal intimidation and violence. Such acts were neither a part of the Union program nor sanctioned by it. The Union and its members merely wished to publicize their activities in the exercise of their constitutional right to picket peacefully. Therefore the statement of the Massachusetts Supreme Judicial Court that—

“The defendants could have availed themselves of the speedy and effectual remedy provided by G.L. (Ter. Ed.) c. 214, §9A, inserted by St. 1935, c. 407, § 4, if they desired a modification or a discharge of the injunction” (Massachusetts Advance Sheets (1944) 433, 441)—

is not an answer to the petitioners' exceptions brought under this petition for contempt. It was unnecessary for the petitioners to seek a modification of the injunction, as the Supreme Judicial Court of Massachusetts suggests, since they had a right to assume that section 6 of the injunction meant what it said, and therefore their constitutional rights were guaranteed.

The construction placed upon the injunction by the Massachusetts courts ignored the rulings of this court that peaceful picketing was a right guaranteed by the Federal Constitution. Cases cited *supra*, p. 11. In adopting this construction, the Massachusetts court, through the use of its contempt powers, punished the petitioners for the exercise of rights established by the Constitution of the United States and sanctioned under the terms of the injunction itself.

The Massachusetts courts interpreted the terms of the injunction in violation of the Fourteenth Amendment in the following manner:

1. The court defined picketing to include a person who goes to the place of the employer for the purpose of watching and obtaining information (Record, p. 18), and then went on to say that any person who was close enough to the fence to perform such picket duty violated the restraining order. Since anyone within eyeshot of the fence or gate would come within this definition, regardless of how peaceful his conduct might otherwise be, this construction deprived him of his constitutional rights.

2. The court instructed the jury that it could find molestation, intimidation and threats in violation of the injunction from the mere presence of peaceful pickets, regardless of the fact that there was no evidence that anyone was disturbed, intimidated or threatened (Record, pp. 20 and 21). This construction obviously prevented any peaceful picketing.

3. The court instructed the jury that the mere gathering together in groups was a violation of section 3 of the injunction (Record, p. 21). This interpretation effectively ignored the ruling of this court in *Hague v. C.I.O.*, 307 U.S. 496. Without any evidence that the streets were blocked or that the public was inconvenienced, the petitioners were deprived of their right to peaceful assembly.

4. The court further instructed the jury that it could find intimidation in violation of the injunction from the numbers of pickets involved (Record, p. 23). The evidence disclosed that the highest number of pickets that appeared at any one time was between twenty and thirty. A group limited to this size does not raise any question of mass picketing. Cf. *Carlson v. California*, 310 U.S. 106, where there were twenty-nine pickets involved. These rulings, which were sustained by the Massachusetts Supreme Judicial Court, deprived the petitioners of their constitutional rights by disregarding the rules and precedents laid down by this court. A proper construction and interpretation of the injunction would have required the court to interpret the provisions of the injunction as strictly as possible to bring them within the rights guaranteed by the Fourteenth Amendment.

The failure of the trial judge to grant the petitioners' motion for a directed verdict, motion to dismiss and request for rulings, and his improper charge defining peaceful picketing, raise the question of the petitioners' rights to picket peacefully under the Fourteenth Amendment. The sustaining of these rulings by the Massachusetts Supreme Judicial Court established the fact that the state court is defining the scope of the Fourteenth Amendment in terms at variance with those laid down by this court. The Massachusetts Supreme Judicial Court apparently has seen fit to vary with this court's interpretation in labor cases.

Cf. *Fashioncraft, Inc., v. Halpern*, 313 Mass. 385.

The Massachusetts court adopted its own notion of the Federal Constitution in ignoring the specific limitation in

paragraph 6 of the injunction itself. It gave the broadest possible interpretation to the language of the first five sections of the injunction making its prohibitions as wide as possible without regard to the constitutional guaranty. In so doing the court deprived the petitioners of their right to due process and their constitutional liberties guaranteed by the Fourteenth Amendment.

As this court stated:

“ . . . The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state.”

American Federation of Labor v. Swing, 312 U.S. 321.

B. THE PETITIONERS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS BY A CONVICTION FOR CONTEMPT OF AN INJUNCTION BASED ON INSUBSTANTIAL FINDINGS OF FACT.

The question of whether the petitioners violated the terms of the injunction (Massachusetts Advance Sheets (1944) 433, 441) brings up the issue of whether the evidence shows the petitioners violated any of the specific mandates of the injunction. This court has stated:

“Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.”

Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293.

The petitioners contend that a review of the evidence in this case will disclose that the conviction does rest upon such insubstantial findings of fact.

The facts brought out in the testimony show that there was no evidence that anyone was threatened, molested, intimidated or disturbed (Judge's Charge, Record, p. 20). It was further established that there was no evidence and no intimation of the use of any force or violence (Record, p. 23; Opinion, p. 442), nor was there any evidence from which the jury could find that there was an attempt to assault anyone or an attempt to injure anyone in his person or property (Record, p. 22). Therefore, the narrow question is whether peaceful picketing as conducted by the petitioners is a violation of the injunction. This brings up the direct constitutional issue of the scope of the Fourteenth Amendment as it defines the petitioners' right to peaceful picketing.

The trial judge in summing up the evidence to the jury pointed out that there was no evidence of any intimidation, disturbance or molesting (Record, pp. 20, 22, 23). Massachusetts Advance Sheets (1944) 433, 442. Therefore there was no violation of paragraphs 2, 4, and 5 of the injunction. Even if the record showed some isolated incidents of abuse, which it does not, it still would not justify the forfeiture of the petitioners' right to free speech. This point was made clear in *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 296, where this court stated:

"Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."

The respondents in open court waived any question of congregating on any private way or private property (Rec-

ord, p. 21), so there was no violation of section 3 of the injunction unless the use of the streets is denied to the petitioners in spite of the clear rulings of this court.

Lovell v. Griffin, 303 U.S. 444.

Hague v. C.I.O., 307 U.S. 496.

Schneider v. State, 308 U.S. 147.

Cantwell v. Connecticut, 310 U.S. 296.

This leaves only section 1 of the injunction for further consideration. The record discloses that only two pickets were stationed at the entrances set forth in the injunction, so there was no violation of this clause of the injunction.

The conviction of the petitioners under this indefinite, uncertain evidence deprived them of their constitutional right to due process. In *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, this court pointed out that it had the duty to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Even the most casual consideration of section 6 of the injunction in the light of the foregoing facts makes more conclusive the petitioners' claim that their conviction requires review by this court.

C. THE IMPOSITION OF CRIMINAL PENALTIES UNDER THE VAGUE AND AMBIGUOUS TERMS OF THE INJUNCTION VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHTS.

This injunction effectively prevented freedom of speech, freedom of assembly and the right to picket peacefully in its first five sections, but at the same time permitted these activities under section 6.

This petition was tried on the theory that it charged the defendants, petitioners herein, with criminal contempt.

Massachusetts Advance Sheets (1944) 433, 437. The petitioners were given a jury trial on this theory and subjected to severe criminal penalties, including jail sentence. Therefore it must be considered as a criminal action subject to the constitutional requirements of due process for such cases. In this instance the criminal penalties which were imposed under the vague and uncertain mandates of this injunction were repugnant to the constitutional principle requiring a clear and explicit definition of the crime charged.

United States v. L. Cohen Grocery Co., 255 U.S. 81.

The ambiguity of the injunction as subsequently interpreted made it impossible for the petitioners to foresee the limits of conduct which would subject them to the criminal penalties imposed. Their calculations based upon the rulings of this court were completely offset by the interpretation placed on the injunction by the Massachusetts courts, which effectively subjected them to an *ex post facto* penalty.

This judgment was based on a common-law concept of a most general and undefined nature.

Cantwell v. Connecticut, 310 U.S. at 308.

Bridges v. California, 314 U.S. 252.

The liberties guaranteed by the Constitution were intended to be given the broadest scope that can be countenanced in an orderly society. *Bridges v. California*, *supra*. The construction placed upon these liberties guaranteed by the Massachusetts courts was narrow and restricted. There was never any showing of any danger to society or to the respondents in this case which would bring it within

the "clear and present danger test" enunciated by this court.

Schenck v. United States, 249 U.S. 47, 52.

Thornhill v. Alabama, 310 U.S. 88, 105.

Cantwell v. Connecticut, 310 U.S. 296, 311.

On the contrary, the vital freedoms guaranteed by the Constitution were wiped out by the action of the Massachusetts courts.

D. THE PROVISIONS OF AN INJUNCTION CANNOT BE USED AS THE BASIS FOR SUBSEQUENT CONTEMPT PROCEEDINGS TO PUNISH LATER LAWFUL ACTS.

Any of the provisions of this injunction which barred future peaceful and lawful activities are void and cannot operate to sustain a conviction of the petitioners. In *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, this court, by a five-to-four decision, ruled that aggravated acts of violence warranted the issuance of an injunction. Nevertheless, the majority opinion did not make clear for how long an injunction so issued would continue in effect and whether or not all future activities, even though lawful, would be barred. It is to be noted that Mr. Justice Reed recognized this problem in his opinion, at p. 318, when he posed the following question:

"Is the right to picket peacefully an employer's place of business lost for any period of future time by past acts of violence?"

In this case it is reasonable to assume that the injunction was not issued under the *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, doctrine, since the reservation of con-

stitutional rights in section 6 of the injunction would be inconsistent with past acts of violence of the kind and nature on which the injunction in the *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.* case was based. However, even if it may be assumed that the injunction was based on this doctrine, the question of its future operation still remains to be decided.

A state has adequate means at its disposal for maintaining law and order, so that short of some clear and present danger there is no justification for depriving, by the use of the injunction, individuals from exercising in the future those constitutional liberties which are the very backbone of our way of life.

VI. Conclusion.

Therefore the petitioners submit that this court should consider this case by issuing a writ of certiorari to the Superior Court of the State of Massachusetts for the County of Worcester.

Respectfully submitted,

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